

JURY TRIALS—DUBLIN, 28TH JUNE, 1890.

NOLAN v. CONCANNON.

CHARGE

OF

THE LORD CHIEF BARON.

Presented to both Houses of Parliament by Command of Her Majesty.



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CHARGE OF THE LORD CHIEF BARON.

GENTLEMEN OF THE JURY.—In the present case there are two main questions for your consideration; as, although the second will be sub-divided into several divisions, it will come substantially to one question.

The first question is—whether the plaintiff was struck, upon the occasion in question, by one of the bullets that were fired by the Constabulary? Unless you are affirmatively satisfied, upon the evidence, that the plaintiff was so hit by a bullet, then he has no cause of action, and it will be unnecessary for you to consider the other and much more grave question which I have to submit to you.

The second question—which I shall hereafter have to state to you more in detail, when I come to mention the considerations arising upon it—is, were the police, under the circumstances, and having regard to the law, as I shall state it to you, justified in firing upon that occasion?

Upon each of these questions a great deal of evidence has been given, and the evidence is not at all consistent; but the case is not one in which it appears to me that it would be of any assistance to you that I should read over to you the evidence that has been given, and contrast each of the small variances in the details given by the witnesses. According to my view, the proper way of dealing with a case of this description is by looking at it as a whole—by ascertaining, as well as you can, how far each witness can be credited; and by grouping together all the evidence that you consider fairly trustworthy, and making such allowance as you think ought to be made (if you think any ought to be made) for the exaggeration usual when cases of this description are being tried, and then, upon the whole, and irrespective of small details, endeavouring to make up your minds upon the subject.

The plaintiff's case is this:—He says he saw this band proceeding towards the station on the evening in question, and that he, amongst others, joined it. He says he did not know where it was going, or the purpose for which it was going to any particular place. He followed it to the railway station, and when he got there he learned that Mr. William O'Brien was in the train. It does not quite appear whether he knew at first that Mr. O'Brien was in custody; and that appears to me to be, to a certain extent, immaterial. His account is that he went to a railway truck which was standing on the platform; that, being anxious to see Mr. O'Brien, he got up, by means of this truck, upon the wall, 5 feet 6 inches high, that bordered the platform upon the railway side; that he crept upon his hands and knees upon that wall until he came opposite the carriage in which Mr. O'Brien was sitting; and he says he was in that position when he was hit by the shot. He says that when he was hit he fell down upon the other side, where the wall is something more than seven feet high—of course he thereby sustained a shock, whether he was hit by the bullet or not. He says that after a time he became conscious, and that he managed to get round ultimately to the platform; and I think upon the evidence it appears that the moment he met the persons who were upon that platform, he at once proclaimed that he had been wounded—that he showed the wound to several persons who were examined before you—that he was brought down upon a truck to Dr. Crean, and was examined and treated by him. That is substantially the statement of the plaintiff in reference to the first question—whether he was actually struck by a bullet. He produced, in corroboration

of that statement, his trousers; and he says that the hole in those trousers was caused by the shot fired on that occasion. He says he also wore a pair of drawers upon that evening. That pair of drawers was not produced at this trial; nor, as I understand, upon the former trial before Mr. Justice Murphy. At all events, it has not been produced before us; and the reason given by the plaintiff for not producing it is, that he says it has been worn out; he says that upon the first trial he was actually wearing it when he was examined as a witness; but however that may be, it was not deemed important that it should be produced at the former trial, and it is sworn as a fact that it was not produced.

The defendants' case is that the plaintiff was not hit by any bullet on this occasion, and it has been presented to you in two different aspects by the counsel who addressed you for them. First, it is said that the entire thing is a mistake, an imagination, on the part of the plaintiff; and secondly, as I understand, the case is presented to you as one in which the plaintiff is wilfully swearing what he knows to be untrue—that not only was he not hit upon the occasion in question, but that he knows he was not hit; and that the evidence he gave was wilfully untrue. Of course, gentlemen, that is a matter entirely for you to deal with, and it requires no observations from me. I am not the judge of the credit of any witness—that is for the jury, and the jury alone. I often think that when a judge, with the object of aiding the jury in determining the credit to be given to a witness, points their attention to various matters in the evidence, he, without intending it, leads them to suppose that he entertains some view in reference to that question. Now, I have not formed, and do not intend to form, any opinion one way or the other as to the truth of the evidence given by the plaintiff; it is not my province to do so; and so far as that part of the case is concerned, I must leave it to your own judgment, without any assistance from me.

But the case was put forward, and rightly put forward, in another aspect by the counsel for the defendants. It was said that, assuming everything the plaintiff says he believes to be true—assuming that he got upon this wall in the way he has described, and that he was opposite the carriage at the time the firing took place, the character of the wound, and the tears appearing in the trousers, are such as ought to lead you to the conclusion that the wound was not caused by a bullet; but that the man having fallen, by reason of fright in consequence of the firing, the wound was caused by one of those little projections which have been described in the evidence of the police as existing on several parts of the wall, near the place where the plaintiff proved that he was kneeling upon this occasion. The place is ear-marked as being behind the board upon which the name of the station, "Charleville," is painted. Well, gentlemen, that, is also a matter entirely for your consideration; and it appears to me that the first question you will have to decide is, whether the injury sustained by the plaintiff was caused by one of those projections which have been described as existing in the wall, or whether it was caused by a shot.

Now, we have some evidence bearing upon that question, which it is well that you should bear in mind. Dr. Cremen has been examined; and he is a very important witness. He says, not that the wound was, in his opinion, caused, but that it might have been caused by a bullet. That is the only evidence which, in the nature of the case, could have been given by the witness; because it is conceded that the appearance of the wound, while it was consistent with its having been caused by a bullet, was consistent also with its having been caused in other ways; and, therefore, it would be impossible that Dr. Cremen could swear that it was caused by a bullet, and nothing else. But what is material in reference to Dr. Cremen's evidence is this—and now I beg of you to understand that I am merely presenting the case to you, as put by the different parties, and without expressing any opinion of my own—that Dr. Cremen swears it might have been caused by a bullet; and that though it might also have been caused by other things, it could not have been occasioned by one of the projections that have been mentioned—so that, if the matter were to rest upon the testimony of Dr. Cremen alone, and if you were prepared implicitly to rely upon his testimony, probably the result would be that you would arrive at the conclusion that the wound was caused by a bullet.

But, gentlemen, I cannot pass over the evidence of Dr. Cremen without a few observations, in reference to his opinion as to what would be sufficient to cause a wound of that nature. He is what we usually call an "expert witness"—that is, he is giving an opinion derived from his professional skill, and is not deposing to any matter of fact which he has himself seen, and we have been in the habit, in these courts, of not attach-

ing the same weight to an opinion sworn to by an expert, as we do to persons who come forward and swear to a matter of fact. In the present case more care than usual is necessary when dealing with the testimony of Dr. Cremen, because (without making the slightest imputation upon him) he is proved to have stated at the last trial that he had not formed an opinion as to what was the cause of the wound. That is well deserving of your consideration. Again, a number of witnesses have been produced to prove that immediately after the firing of the shots in question, Dr. Cremen, so far from expressing an opinion that this wound could have been produced by a revolver bullet, said the contrary. At the former trial no opinion was given by him, and you are to contrast the opinion now given with the absence of opinion on the former trial. But when we go further back in the history of the case it becomes more important, because the contrast then is between the evidence now given by Dr. Cremen, that the wound might have been caused by a bullet, and the statements made by Dr. Cremen shortly after the event (if you believe he made them) that in his opinion it could not have been produced by a bullet. The matter is one altogether for you, but unquestionably it appeared upon the cross-examination of some of the witnesses that Dr. Cremen appeared to be in doubt as to how the wound could have been produced; and that that doubt was caused, not (as observed by Mr. Sullivan) by the character of the wound itself, but by the appearance of the hole, or tear, or whatever it may be, in the trousers; and he seems also to have considered that if the injured flesh had dropped out—then, notwithstanding the appearance presented by the trousers, he would be satisfied that the wound had been caused by a bullet.

Now, gentlemen, all these matters must be taken into consideration by you, and proper weight given to them, and taking them into consideration you must come to a conclusion to what extent, if at all, you will act upon the testimony given by Dr. Cremen. I can quite understand the difficult position in which Dr. Cremen is placed. I quite understand the feelings that are aroused by these so-called "political cases"—and I can understand and sympathise with the position of Dr. Cremen, who was the local medical attendant of the police in Charleville. This was a matter which, above all others, ought not to have been made a subject of conversation between members of the Constabulary and Dr. Cremen; it appears, however, that it was again and again referred to, canvassed, and argued between them; and I have no doubt that every word said by Dr. Cremen on those occasions, and every expression he used, that could serve the case of the Royal Irish Constabulary, was treasured up in their remembrance. I do not mean by that to make any imputation upon the witnesses who have deposed to those conversations. The conversations having taken place, what was said by Dr. Cremen was admissible in evidence. It was their bounden duty to come forward and state their recollection of what occurred; but I can quite understand the difficult and embarrassing position in which Dr. Cremen is placed in being produced as a witness against the police; and I can quite understand such conversations as have been deposed to taking place between some of the members of the force and Dr. Cremen, as to the cause of this wound, which appears to a certain extent to have been a puzzle to all of them.

I pass now from the evidence of Dr. Cremen to the next circumstance relied upon in support of the plaintiff's case; that is, that it appears at once to have become known to the police that he had been wounded, and that he attributed the wound to the acts of the police. Accordingly, on the next day, he was waited upon—and rightly waited upon—on two occasions, by members of the force; and the evidence is that on each of those occasions the wound was shown to the member of the force who was called, that the trousers were shown, and I believe the drawers; and that such questions as were asked were answered by the plaintiff. But it appears that that day having elapsed, and the police having come to him upon other occasions, and made further inquiries, and again asked to see the trousers, the plaintiff refused to produce them, and according to the evidence—the truth of it is entirely for you—the reason he gave for not producing the trousers was that it had been taken from him; and according to his own evidence at the present trial, that reason was untrue, as the trousers had not been taken from him. All these are matters you will have to consider, with a view to determining whether they detract from the plaintiff's evidence, and if so, to what extent; and you will take his testimony, subject to such discount, if any, as you think should be deducted from it, by reason of those matters.

Gentlemen, that is substantially the plaintiff's case in reference to the first question; and I now come to the defendants' case. The defendants are not able

to give direct testimony—because it would be impossible for them, having regard to the circumstances under which those unfortunate shots were fired, to give any direct evidence as to the impossibility of their hitting the plaintiff. If the shots had been fired merely for the purpose of alarming the crowd, and without the object of taking life—that is, if the weapons had been pointed so high that it would have been impossible they could have hit any person in the crowd, and especially any person in the position in which the plaintiff was—if that were so, it would have been conclusive against the case of the plaintiff. But that is not the evidence as to the way in which the shots were fired. The evidence is that the shots were fired for the purpose of taking effect. That is the evidence of the police themselves. Now, the wound to the plaintiff appears to have been given at a point slightly more than five feet and a half above the platform. I take it for granted that his leg must have been a little above the top of the wall; it therefore was within the range of the revolvers pointed at the crowd; and no argument founded upon the idea that he was at too high an elevation above the platform can be accepted. The argument, therefore, of the defendants is this—that the circumstances are either inconsistent with the case of the plaintiff, or that they do not establish his case with sufficient clearness to justify you in finding a verdict against the defendants. First, it is said, and, although I have no special knowledge on this subject, I must commend it to your careful consideration, as being possibly, upon this part of the case, a most crucial matter, that the hole or tear which is in the trousers could not have been made by a bullet. I do not pretend to have any knowledge on this matter, but the evidence given by the last witness produced by the defendants—Sir Robert Jackson—who says he has great experience of gunshot wounds, is that, according to his opinion, a hole or tear of this description could not have been caused by a bullet. Of course that is “expert evidence,” but still it is proper for your consideration; and it is to be remembered that the doubt, which at one time appears to have existed in Dr. Cremen's mind, as to how the wound was caused, seems to have been occasioned to a great extent by the shape of this hole or tear in the trousers. The matter, gentlemen, is for you—it is one upon which I cannot afford you any assistance.

Next, gentlemen, it is said that a circumstance has taken place which ought to prevent you from placing any reliance whatever upon the plaintiff, and, as the first question rests almost entirely on the plaintiff's evidence, if you reject his testimony as not trustworthy it will be very difficult for you to give him a verdict at all. I have not the least idea whether you will attach any importance to the circumstance or not. That is a matter for you and not for me, but it has been proved in evidence that the second hole in the plaintiff's trousers, to which attention was called the day before yesterday by one of your body, was not shown, or at all events that attention was not called to it at the last trial. It has been suggested by the defendants' counsel that the hole was not in existence at the time of the last trial; certainly no reliance was placed upon it, nor, indeed, has there been any reliance placed upon it at this trial by the plaintiff's counsel; but it is suggested on behalf of the defendants that the trousers have been tampered with by the plaintiff, for the purpose of making it appear that there was an exit for a bullet, thus getting rid of one of the difficulties which appears to have been relied on at the former trial. You will deal with that, gentlemen, as best you can. You have also the difficulty as to the very slight nature of the wound, and you have to consider whether it might not have been occasioned by one of those projections which have been referred to as existing in the wall. That, gentlemen, is substantially the case of the defendants upon this first branch of the case. I leave it to you, without indicating the slightest opinion of my own upon it, one way or the other; you will have to make up your minds upon the question whether the plaintiff was or was not struck by a bullet on the occasion in question. If you are not satisfied affirmatively that he was, your verdict should be for the defendants irrespective of the other question. If, on the other hand, you are satisfied affirmatively that he was struck by a bullet, then you will have to consider the much more serious question which I now have to submit to you.

Now, upon this second question—that of justification, the defendants present their case to you in three different modes; but when I explain them accurately to you, you will perhaps come to the conclusion that, in their main features they are substantially the same; and probably they will all depend upon the view you take of one and the same matter. There is a good deal of preliminary matter in these pleas that I need not trouble

you with, as no point has been made with reference to it. They set forth the warrant, which they say was duly endorsed, so as to enable Mr. O'Brien to be arrested in Cork on foot of it, and they prove that he was arrested upon that warrant at the Clonakilty station in Cork; that he was brought in custody by the District Inspector under that warrant to the Cork station of the Great Southern and Western Railway, and was in lawful custody when he arrived at the Charleville station. No question as to the legality of that warrant having been raised at the trial, I must tell you that, in point of law, Mr. O'Brien was in legal custody in that railway carriage at Charleville; and we must commence to consider the question of justification on the assumption that he was in legal custody. The defendants' case, then, is that there were, at or shortly after the arrival of the train at Charleville, a number of persons riotously assembled. They do not say, nor are they bound to show that at the commencement, or at the moment that the train entered the station, the assembly had assumed the character of a riotous assembly; but they do say that before the firing of the shots in question, there were at that station a number of persons riotously assembled, and having made that statement which is common to their three-fold case of justification, they say (1) that there was an attempt by that riotous assembly to rescue Mr. O'Brien; (2) they say in the alternative that there was an assault by that riotous assembly on the police; and they say (3) that if neither of these states of things existed, there was a reasonable belief upon the part of the police that there was an attempt to rescue Mr. O'Brien, and if necessary for that purpose, to assault them. And then as to all the branches of the defence there is a final question on which, in my opinion, a great deal, if not the entire, of this justification will depend, namely—that it was necessary under these circumstances for the police to fire; that is, that it was necessary either for their own protection, or for the purpose of preventing the rescue, or for the purpose of preserving the public peace.

To enable you to consider these defences, I must tell you, in the first instance, what in point of law amounts to a riotous assembly. I shall then try as quickly as I can to lead you through the various facts in the case up to the assemblage of those persons at the railway station, and I will then leave to you the questions arising on these pleas.

I do not know whether you observed that I asked the Counsel for the defendants last night, in order that there might not be any difficulty in point of law on it hereafter—whether he conceded that this allegation of a riotous assembly was necessary to the validity of his pleas, or whether an illegal assembly, which is also alleged, would be sufficient for that purpose; and he stated that he would upon that point rely on the words "riotous assembly." We must, therefore, consider what a "riotous assembly" is. The best definition that has been given of a riot is a definition by Hawkius, a writer of authority on criminal law. He defines it as "a tumultuous disturbance of the public peace by three persons or more assembling together of their own act with the intent mutually to assist one another against any one who may oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner to the terror of the people, whether the act intended were of itself lawful or unlawful. An unlawful assembly must be proved, and therefore if a number of persons meet together at a fair and suddenly quarrel, it is an affray and not a riot; but if, being so assembled, a dispute arises and they fall into parties with promise of mutual assistance, and then make an affray, it will be a riot; and in this manner any unlawful assembly may be converted into a riot, and so a person joining rioters is equally guilty as if he had originally been one of the riotous assembly."

The reason I have read the entire of that definition is, because a question arises on it upon the evidence. It appears that there was to have been some meeting in some part of the county of Cork on that Sunday, at which Mr. William O'Brien was to speak, and that there was an order of the Government proclaiming, or, as it has been called, suppressing that meeting, so that the meeting was not in point of fact held. It appears that a deputation had left Charleville for Cork for the purpose of attending that meeting, and that the deputation was expected to return by the night mail on Sunday, and that the band went to the station for the purpose of meeting the deputation when so returning. Now let us stop there for a moment. We know nothing of the circumstances under which the meeting proclaimed by the Government was about to be held, nor can we deal with it as being otherwise than a legal meeting, because illegality is not to be presumed. There, therefore, was nothing unlawful in the Charleville deputation so far as the evidence in the present case goes. I wish to keep myself altogether

outside of matters not proved. So far as the evidence in this case goes, there was nothing illegal in the Charleville deputation going to Cork, nothing illegal in the Charleville deputation returning from Cork, and nothing illegal in the band going to the station to meet the Charleville deputation, unless the circumstances were such as were likely to lead to a breach of the public peace.

Well, gentlemen, that band, according to the evidence, passes the police station in Charleville, in which was a sergeant and a constable. There are two other constables in the town who were at their lodgings at the time, but who were no doubt capable of being communicated with; and the circumstances of the band having passed this police station were not it appears such as to inspire in the minds of the constable and sergeant who saw them any apprehension of a breach of the public peace; and, accordingly, none of the constables of Charleville went to the railway station: the two that were in the barrack remained there, and the other two who were at their lodgings were not disturbed. Therefore you see that if nothing had happened except merely the band being at the railway station with a crowd of, perhaps, a hundred following them, if nothing else had happened than that, and if they did nothing illegal after they had arrived at the station, the purpose for which they went would not *per se* be sufficient to render it an illegal assembly, much less a riot; and therefore if this assembly did become a riot, it became so, not in its origin, not by reason of the circumstances under which the assembly did in the first instance meet, but because of circumstances which afterwards took place. In other words, it comes within the last sentence which I read for you from Mr. Hawkins' book—"An unlawful assembly must be proved; and therefore if a number of persons meet together at a fair and suddenly quarrel, it is an affray and not a riot; but if, being so assembled, a dispute arises and they fall into parties with promises of mutual assistance, and then make an affray, it will be a riot, and in this manner an unlawful assembly may be converted into a riot." As I understand, it is no part of the defendants' case that this assemblage was illegal in the first instance; their case is that it became illegal during the course of the transaction. I wish to make this clear to you, because we never shall be able to appreciate correctly this question of a "riotous assembly" without bearing in mind the distinction between the two cases—first, of the parties assembling for an unlawful purpose; and second, that of assembling for a lawful purpose and something unlawful afterwards springing up.

I should like to illustrate this, even at the risk of wearying you. Suppose there is a lawful writ issued to the sheriff to give a party possession of lands, and a number of persons assemble for the purpose of obstructing the sheriff, or of rendering it more difficult for him to perform his duty, or of unreasonably annoying him in the execution of his duty, there the purpose is illegal, and the very moment that any act is done in pursuance of that common purpose of a tumultuous character by even one person, at that moment, in point of law, the assembly becomes a riotous one, and every person joining in that assembly for that purpose, not only becomes responsible for his own acts, but is liable to be treated as a rioter. But you will observe that in that case the object of the assembly was an illegal one; it assembled with the intent of committing an unlawful act, and the very assembling together for that purpose was itself a crime, and was the origin of the mischief. You will see that a case of the present description is wholly different. Upon the evidence here there was no criminality in those bandmen going to the railway station to meet the deputation returning from Cork. It is not pretended that they knew of the arrest of Mr. O'Brien. Let it be understood that what I shall say as to the legality of this band going to the station is partly grounded upon that fact, that it is not pretended that it was known in Charleville that Mr. O'Brien had been arrested, because if it had been known a question of much graver and more difficult character would have to be submitted to you, for I do not intend to lay it down as a matter of law, that a number of persons can lawfully assemble and go to a railway station in consequence of the arrest of a person who is, as has been said, their popular idol, for the purpose of expressing their sympathy and the views they may happen to entertain as to the grounds upon which he had been taken into custody. In this case, however, we have nothing to do with that. It is the case of both parties that the arrest of Mr. O'Brien was not known and could not have been known in Charleville, and that this band went to the station for the lawful purpose I have mentioned of meeting a deputation of their townsmen who were returning from what we must assume to be a legal meeting. Unfortunately, however, when they arrived at the station it was ascertained by them that Mr. O'Brien was in the custody of the police in the train. As an eminent Judge said a short time ago, "we are not to live up

in a balloon," and you are not bound to dismiss from your consideration, the probable result on an assembly such as this, of knowing that so popular a gentleman as Mr. William O'Brien had been arrested, and was actually in the train in the custody of the police. Knowing that he was in custody, if any number of persons in that crowd by words, by gestures, or by a common understanding—I care not how arrived at—agreed that they would rescue Mr. O'Brien, that moment the persons so agreeing became an illegal assembly, and in the same way, if without intending to go the length of rescuing Mr. O'Brien at all hazards, they arrived at a common understanding that they would attempt to rescue Mr. O'Brien, that, too, was illegal; or if they came to an understanding and purpose that they would assault the police in the mode in which there is evidence that the police afterwards were assaulted, then those persons so agreeing became an illegal assembly, and every other person there, knowing of those matters and agreeing to the illegal purpose, and then in a tumultuous manner proceeding to carry it out, became rioters. Therefore it is, gentlemen, that you will observe that if the element of riot existed in this assembly, it must be gathered from what took place on the platform of the railway station on that occasion. Persons can agree to an illegal act, and thereby become rioters in a moment; and an assembly perfectly lawful can in a moment be converted into an unlawful assembly. But I do not think that you ought to leave out of consideration the short period of time that must have been occupied by this scene which has taken us two days to consider. One of the railway officials proved that it was about five minutes from the time the train entered the station until it left. It must have taken some time before the crowd could have discovered that Mr. O'Brien was in the train, and in custody. It appears that a young man of the name of Kelly, who was one of those returning to Charleville, got out of the train, and, for the first time, told the people on the platform that Mr. O'Brien was in custody; then there appears to have been, according to the evidence of all the witnesses, a sudden movement of the crowd up along the carriages, as if they were looking for that in which Mr. O'Brien was. The blinds of that carriage had been pulled down, and the crowd passed it without seeing that he was there, and arrived at the engine without having found him. They returned along the platform, and then, while going the second time along the train they found the carriage in which Mr. O'Brien was seated. I believe it would be hard, gentlemen, to attribute the commencement of the riot, if riot there was, to any period earlier than that at which the crowd discovered the carriage in which Mr. O'Brien was seated. Thus you will observe, gentlemen, that the period of time we have to deal with is a very short one, and we must now try to ascertain what are the acts which are alleged by the defendants to have converted this lawful meeting into a riot.

Unquestionably, the crowd were anxious to get into the carriage in which Mr. O'Brien was, but there is a conflict as to their object and intention in getting into it. On the part of the plaintiff it is said that their object was to shake hands with Mr. O'Brien. Evidence has been given by Mr. Kelly and by Mr. O'Brien himself that when the only person, except the railway porter, who entered it got his feet on the floor of the carriage he reached forward his hand to Mr. O'Brien, and used the words "God bless you," or something of that description. On the other hand, there is a body of evidence given, the truth of which will be for you, that there were also cries of "We have him now; we won't let him go," and, I suppose, you may assume that there was a great deal of abuse of the police. The important matter is that it is proved that there were cries of "We have him now; we will not let him go." It has been denied on the part of the Plaintiff that there were any such cries; but, gentlemen, even if there were such cries it is not necessarily to be assumed by you that because one or more persons in a crowd of that description utter a cry such as that, there is necessarily a determination, on the part of the entire body, either to rescue or to attempt to rescue the prisoner. It is a matter to be taken into consideration with all the other evidence in the case; but it would be a very erroneous conclusion to arrive at that because there was one or even several cries of that description, therefore it should at once be assumed that a rescue was attempted, and that in point of law there was a riot. I rather think that in a case of this description, while I do not at all seek to minimise the value of the effect that ought to be given to the cries uttered by the crowd, the first matter to be looked to by a jury is the acts rather than the cries of the crowd.

Now, gentlemen, let us consider what those acts were. As I understand the acts in question—and you will understand now that I am dealing, not with the conduct of the police, but with the acts of the crowd, and whether what took place on their part

did or did not amount to a riot—according to the evidence of the police there were three attempts made to enter the carriage irrespective of the entry by the porter when he came to look for tickets. Were I a juror, I should put that attempt of the porter out of consideration altogether, I mean as an illegal attempt to enter the carriage, because the man was there in the discharge of his duty, and I only wonder that instead of turning him out of the carriage in the way in which they did, one of the police did not ask him to lock the carriage door. And, gentlemen, if the door had been locked a great deal of what afterwards took place would have been avoided. But that, gentlemen, was not done, and we have to deal with these alleged three attempts to open the carriage door. Now, deducting from the short time during which this occurrence lasted (which probably did not exceed three minutes), the time occupied in the conversation with the porter as to the tickets, the police are probably substantially accurate when they say that those three efforts to open the carriage door continued during the entire time that the train remained at the station. One man, and one man only, as it appears, succeeded in getting in. No evidence is given by any person that there was any attempt by that one man to rescue Mr. O'Brien. If he had said "Come out, Mr. O'Brien, we have you now and we won't let you go," there might be some reason for the statement that a rescue was being attempted. But the uncontradicted evidence is that the words the man used were "God bless you," or some expression of that description, and it will be for you to say can you possibly construe that as an attempt to rescue. Well, there were two other attempts during the three minutes to open the carriage, and if the efforts made on that occasion were made for the purpose of rescuing Mr. O'Brien, unquestionably that action, if you believe that it took place, might amount to a riot; that is to say, the intent would be illegal, and if you consider that the action of these parties was tumultuous, then you would have every element necessary to constitute a riot. But, looking broadly at the case, having regard to the suddenness with which this matter was as it were sprung on the assemblage, having regard to the fact that they had assembled originally for an innocent purpose, and to the acts proved to have been done prior to the firing of the shots, the question will be for you whether on the whole, and looking on this transaction as men of the world, you are prepared to say that this assembly amounted to a riotous one within the definition that I have given you. If you are of that opinion you will answer the first question which I shall submit to you on this branch of the case, in the affirmative.

Gentlemen, in coming to the conclusion that there was a riotous assembly, you cannot leave out of consideration the assault which is proved to have been received by Mr. Concannon, and which I suppose is not doubted by anybody, because it is proved by the doctor that he was suffering from it for a considerable time—I mean the wound on his head—I treat the wrench of his arm in a different way, as although it was an injury which he received in the discharge of his duty, it was not the direct act of the mob, it was an act which resulted from his efforts to resist the opening of the door. But we cannot leave out of consideration in considering whether this meeting assumed the character of a riot, the injury that was undoubtedly sustained by District Inspector Concannon, the breaking of the glass by whatever may have been the instrument by which it was effected, and the firing the shot by the crowd, if you are of opinion that, in point of fact, it was fired. But, gentlemen, if you are of opinion that these were acts of isolated individuals, and that there was not a common purpose amongst the number of people engaged, either to rescue Mr. O'Brien or to attack the police, then these acts should be attributed only to the individuals who committed them, and not to the entire crowd of which they were apart.

I pass from that question. It does not appear to me to be one on which I can give you any further help. The next question is whether those persons did attempt to rescue Mr. O'Brien, and if you are of opinion that the real intent and object of the persons who were there assembled was to rescue Mr. O'Brien, then you will hold that the acts they committed amounted to such an attempt. Trying to get into the carriage would under such circumstances be an attempt to rescue, although the very same act of entering the carriage, if it was not actuated by that intent, would not amount to such an attempt. In the same way, I have to ask you whether the persons assembled assaulted the defendants acting in the execution of their duty. There is clear evidence of an assault on the defendants in the execution of their duty. Was it the act of one individual? If you do not believe on the evidence that it was the act of more than one, and that it was not done in the execution of any common illegal object, it would not become an act of the entire crowd. But if you think the circumstances were

such that these assaults on the defendants should be attributed to some object common to the crowd, then they would become the acts of the crowd, and in that way would amount to an assault by the crowd on the police in the execution of their duty.

Gentlemen, the fifth question is, "Did the persons so assembled assault the defendants?" and I have already said what occurs to me in reference to that.

The next question is—"Did defendants believe, and had they reasonable grounds for believing, that such persons were about to attempt to rescue Mr. O'Brien, and if necessary for that purpose, to assault them?"

You will observe that, to this, I have been dealing with what took place as a matter of fact, and that I have not once referred to the belief entertained by District Inspector Concannon, or the men under him.

I pass now from the facts, as they actually existed, and come to consider the facts, as they were believed to exist by Mr. Concannon and the police acting with him, and believed on reasonable grounds. This question should be answered in favour of the police, if you are of opinion that they did, as a matter of fact, believe, and had reasonable grounds for believing, that those people were about to attempt to rescue Mr. O'Brien, and to assault them for that purpose, even if, as a matter of fact, there was no such intention on the part of the crowd.

I shall tell you what my own view is of the difference between this question of reasonable belief, and the question of the matter of fact. We, having heard the evidence, now know the object with which this crowd came to the station. We know that that object was not to rescue Mr. O'Brien, but was to meet their companions, the deputation that was returning from Cork; and probably that may influence you in your determination of the matter of fact whether there was an attempt by the crowd to rescue Mr. O'Brien; but Mr. Concannon and the other police did not know that; and therefore they in forming a reasonable belief, could not have the element that we now have—they could form a reasonable belief only upon the facts within their knowledge. But, gentlemen, when considering this question of reasonable belief, you must remember what the Royal Irish Constabulary are. You must remember the purpose for which that force is formed—the purpose of preserving the public peace—the purpose of insisting upon the performance of the law, often under difficult circumstances. Whatever may be thought or said about them by other persons, I know that, often and often, in courts of justice, the conduct of the Royal Irish Constabulary, under the most trying circumstances, in refraining, under extreme provocation, from resorting to force, has been such as to entitle them to the highest commendation; but I venture to say that the public are entitled to look to every one of the Royal Irish Constabulary as men who are not on a sudden to take fright; who are not, upon the moment, to lose their heads; who are not to give way to imaginary terrors; but as firm, brave resolute men, who know that their position involves a certain amount of responsibility and risk, but who will stand forward and do their duty in whatever circumstances they may happen to be placed. The law confers upon them important privileges, but those privileges must be exercised upon their own responsibility; and, in my opinion, nothing will tend more to preserve the high character the Royal Irish Constabulary have borne, and, as I believe, still bear, throughout Ireland, than the knowledge on the part of each one of them—a knowledge present to their minds in moments of emergency—that their acts, and the belief upon which their acts are done, may become matter of investigation in the calm region of a court of justice, where a jury, representing the community, will fairly and impartially gather, as best they can, the facts as they existed at the moment, the knowledge by the members of the Constabulary of those facts, and as a court of appeal, pronounce their judgment as to the conduct of the Constabulary being reasonable or otherwise. Mr. Carson has rightly told you that you ought not to leave out of consideration the fact that the defendants were obliged to act on the moment, and in a remarkable emergency, still you are not, because the constables may have thought that a certain state of facts existed, to at once concur with them, and say that you think so too. You yourselves must form your own independent judgment upon the facts as they were known to the constables at the time, making such allowance as you think right for men who were suddenly placed in a trying position. Make such allowance for that as you think right, but you must exercise your own independent judgment upon the matter, never forgetting that your verdict upon this question, whether it was justifiable to fire, under circumstances which might probably have taken human life, may be acted upon as a precedent hereafter to mark the limits of the lawful action of the Constabulary, and the circumstances under which the lives of people—some of them perhaps wholly innocent—may be endangered, or even sacrificed. I do

not want you to leave out of consideration the reasonable belief of Mr. Concannon. On the contrary, I am anxious you should know the facts as known to him—that you should place yourselves in his position, and carefully consider what he might reasonably believe to be the intention and object of the crowd on the occasion; and if, upon the whole, you come to the conclusion that he believed there was an attempt to rescue Mr. O'Brien, and that he had reasonable grounds for that belief you will, of course, so find.

I now come to what I consider to be the main question in the case; and for the purpose of it I shall assume that you have arrived at the conclusion that there was an arrangement that there should be an attempt to rescue, or an assault upon the police; or, at all events, that there was a reasonable belief, on the part of the police, that there would be an attempt to rescue, or that the police would be assaulted. When I say I assume that, do not understand me as expressing any opinion of my own upon the subject. That is not for me, but for you. I do so because it is only on that assumption that the important and vital question arises—was it necessary, under the circumstances that the police should fire? Was it necessary for their own protection? Was it necessary to prevent a rescue? Was it necessary for the purpose of preserving the public peace? In approaching the consideration of this question, you should bear in mind that according to the evidence, and the Constabulary regulations, those four shots were fired with intent that they should take effect. That is the regulation; and as far as I am able to form an opinion, it is a wise regulation, because I believe all persons agree that firing shots not intended to take effect only tends to lead a riotous mob to believe that the authorities are not in earnest, and that in result the disturbance becomes worse. But, however that may be, the evidence is, that in accordance with the Constabulary regulations, those four shots were intended to be fired with effect—that is, they fired with intent to wound, and if it should so happen, to kill some of the crowd assembled on that platform. I am not aware that in point of law any state of facts would amount to a justification of the wounding complained of here, which would not also be a justification if the result of those shots had been to take several lives.

Let us first see (for every case must be decided upon its own circumstances), of whom, upon the evidence, it might reasonably be assumed that the crowd upon that platform consisted. Passengers from Cork, and possibly from some of the stations between Cork and Charleville had got out of the train, and may have been standing on that platform innocent of everything—innocent even of approving of the principles of Mr. O'Brien. Whether any such passengers were there, I do not know; but whatever may have been their views they were entitled to hold them, so long as they were legal; and the first fact we have is that there may have been upon this platform passengers who had lawfully come by the train to Charleville, either from Cork or some of the intermediate stations, or who had come to the Charleville station for the purpose of travelling to some of the other stations along the line to Dublin. Again, there were at least two railway officials, who were actually upon this platform in the performance of their duty—and there you have a second class of persons entirely innocent, *prima facie*, of any participation in the illegal acts alleged.

Again, there were a number of persons on the platform, armed, not with offensive weapons, but with the more innocent musical instruments of a band; and there were a number of persons who followed that band, and who also constituted part of that crowd. Among that crowd there may, in the opinion of the police, have been some persons who were inclined to join in an attempt to rescue the prisoner, Mr. O'Brien, but upon that crowd (comprising a number of persons of whose innocence or guilt it was impossible for the Constabulary to form any opinion) the police fire those four shots indiscriminately, careless who shall be hit—caring nothing but that some one shall be hit. That may have been necessary; it is not my province to say that it was not. All I say is that it was a fearful necessity, that by reason of a sudden disorder at a railway station, there should be a justification in point of law for the shooting down of any four members of that crowd, whether innocent or guilty, who might have chanced to be in the way of those four bullets. Now, that is in the forefront of this case—I deal with it very much upon the evidence of the police themselves; and the question you have to ask yourselves is, was that necessary? Now, take the justification. Suppose that, after those so-called attempts at rescue had been, as they were, successfully resisted, and after the railway porter had been hustled out of the carriage; supposing that after that, another man, or body of men, had burst into the carriage, and had rushed over to Mr. O'Brien, saying "Now, Mr. O'Brien, come! We are stronger than

the police—Come out"—possibly I could understand that man being shot down by the police, as the police are entitled, even at the risk of human life, to keep the prisoner whom they had in lawful custody; but it occurs to me that the question you have to consider is, whether there was any justification for the police firing in the darkness of the night on an insufficiently lighted platform, upon a crowd of 50 or 100 persons, careless who they might kill.

Gentlemen, I have to tell you that, in point of law, a state of facts might exist in which that would be justified, if that were the only mode by which Mr. Concannon could protect himself and his men, or if it was the only mode by which he could prevent the rescue of the prisoner. The question is, do you think that in the present case that state of facts existed? We are not now trying the general body, or the general conduct, of the Constabulary. We are confined to the conduct of the Constabulary upon this particular occasion. In considering the question whether the firing on that occasion was necessary, you will have to take into consideration the conduct of this crowd. Upon that there is a remarkable conflict of evidence. Upon the one side you have evidence that the crowd consisted of about fifty; upon the other, that it included nearly 100, persons. You have evidence on the one side that a shot was fired by the people; upon the other side you have evidence from a number of witnesses that no shot was fired by the people. On the one side there is evidence by a number of witnesses that there was a great deal of disorder and violence amongst the crowd; upon the other hand, it is sworn that, with the exception of a great deal of unjustifiable groaning, hooting, and boozing, there was no disorder. You have no evidence of any shot, save one, having been fired by the people; nor have you any evidence that there was any weapon in the crowd, except so far as the fact of the shot having been fired (if you believe it), evidences that there must have been. You have no evidence of any injury having been done to any one of the police, except a scratch upon one of the constables, and the injury which was sustained by Mr. Concannon. You will apply your own sound judgments to the evidence, and come to a conclusion whether, even if the state of facts alleged really existed, the necessity was so imminent as to justify the firing.

I suggested at the close of the case that a question should be asked of District Inspector Concannon in reference to the body of police in the train other than those that travelled in the carriage with Mr. O'Brien. I did that, not as expressing any individual opinion of my own, but in order that he should have a full opportunity of presenting before you what his views were as to the use intended to be made of those members of the police force. You have heard his evidence upon that subject, and you will give it full consideration. In my opinion the matter is one not without importance. It was known to the police authorities that Mr. O'Brien might be the object of popular recognition upon his journey down to Tipperary, or the Limerick Junction; and according to the evidence there was an escort of police which I am justified in saying was larger than the escort which usually accompanies a prisoner. There were in the train as many as seventeen constables in addition to the District Inspector—that is, six men in addition to Mr. Concannon in the carriage with Mr. O'Brien, and eleven constables in another carriage, 34 yards distant. I may be quite wrong, but it would occur to me that when men are sent upon an escort of that description, they should be so arranged and distributed that the officer in command should be able to avail himself of their assistance at any critical moment; but, as far as this case has been conducted by the defence, it appears to me that they have endeavoured as far as possible to eliminate the fact that there were, within 34 yards of this carriage, eleven other constables. It is a remarkable commentary upon the evidence we have heard as to the great riot and disturbance said to have taken place at this station on that occasion, that within 34 yards from the centre of the disturbance there should be eleven constables, not one of whom appears to have heard anything that indicated any danger to the public peace, or any attempt to rescue Mr. O'Brien. Were there anything which, in the view of those eleven constables, amounted to a riot, in which the public peace, or the custody of the prisoner, was in danger, it would have been their duty to use their best endeavours to quell the disturbance and restore the public peace. Mr. Concannon was asked was it not possible for him to have communicated with the eleven constables who were in the other compartment; and whether those eleven men would not have been able in a moment to sweep away the crowd—whether it consisted of fifty or a hundred. You will ask yourselves that question. Was there any real, practical difficulty, to a brave, resolute, firm man, in communicating, or at all events, in making an endeavour to communicate, with those eleven men? When for the first time the crowd assumed an angry appearance, when Mr.

Concannon first feared for the safety of his prisoner, or when he heard the first cry "we have him now, and won't let him go"—would it have exposed the men in the carriage to unreasonable danger to have despatched say two of them—keeping still five in the carriage for the protection of the prisoner—to communicate with their eleven companions? Or, even if that could not have been done, would it not have been possible, at a distance of 34 yards, to have made their situation known by shouts to the reserve men in the other compartment, or by a constable passing through the window at the furthest side from the platform? If, in any of those ways, those eleven men had been communicated with, there would have been an end of the difficulty. All these are matters for your consideration, not for mine. I have been obliged to bring these considerations before you, because I know the gravity of the constitutional question that lies at the bottom of this case. The question of necessity is for you, and must be determined by you, wholly irrespective of any opinion I may have formed, whether I have formed any opinion or not. Believe me, gentlemen, no graver duty has ever been imposed upon a jury, either in a civil or criminal case, than that which the law imposes upon you, in the determination of the last question I have submitted to you.

The only remaining question is one which I do not myself think necessary, but I have been asked to leave it to you. The defendants allege that the plaintiff was himself a party to this alleged riotous assembly. My view is, that if there are a party of rioters, and that their conduct is such that it is necessary to fire, and that, in the necessity of the firing, an innocent man is killed, my view of the law is that the constables are not responsible for that. My view of the law is, that such is the overwhelming duty of the police to prevent the rescue of a prisoner, that if in preventing it, it becomes necessary to fire, and that, in consequence of that necessary firing, an innocent person is killed, it is justifiable. The chance that the firing may probably kill an innocent person is no more than an element for the jury, in coming to the conclusion whether the necessity existed. At all events, I must ask you to express your opinion on the question, whether the plaintiff was or was not a party to the riotous assembly.

I have but one word more to say to you, and that is on the question of damages. It is a golden rule that in reference to damages a jury should be moderate and temperate. When jurors are occupied with such important constitutional questions as arise here; involving on the one hand the safety of the lives of the community, and on the other the due protection of the Constabulary in the performance of their duty, the effect of such questions on the human mind is often to enlarge the views a jury take on the question of damages, and damages are consequently sometimes measured in accordance with their enlarged views. I beg to warn you against making any such mistake as that. I do it with all submission to you—I have no right to do it, but I suggest that when you come to consider the question of damages—if you do come to consider it—you will be reasonable and temperate, having regard to the character and circumstances of the case. Of course nominal damages, in a case of this kind, are not to be thought of. The plaintiff sustained an actual physical injury, although a slight one; he sustained considerable inconvenience for some days, and was for some time unable to attend to his work. That, even taking the lowest view of it, would be an element of damage; but over and above that, gentlemen, it is not a pleasant thing for a person to receive a gunshot wound; and while I recommend you to be very reasonable and temperate in measuring the damages—if you think the case is one in which the plaintiff is entitled to any damages—you are entitled to take into consideration the nature of the action, and the persons by whom the shots were fired, and to give such temperate and reasonable damages as will mark your sense of the case, and your opinion that greater care should be exercised for the future before shots are fired under such circumstances as have been deposed to in this case.

Lastly, I beg to impress upon you what I have already said, that it is your opinion, and not mine, that must govern the case. I have no right to express any opinion as to whether there was a necessity for the firing or not; I beg of you to consider the question entirely for yourselves, irrespective of the observations I have made, which were merely for the purpose of bringing before your minds the considerations that ought to influence you in coming to a verdict.

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